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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES, Defendants. AND RELATED ACTIONS.	NO. 98-0088 CRB **BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF DEFENDANTS MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION** **DATE: February 22, 2002** **TIME: 10:00 a.m.** **DEPT.: 8** **Hon. Charles R. Breyer**

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STATEMENT OF AMICI CURIAE

Amici Curiae State of California, the County of Alameda, and the City of Oakland have a constitutionally protected interest in the health and welfare of their residents and citizens. Each amici has a unique and protected interest in the health and safety of its citizens and each, either through statute, by ordinance, or by lawful declaration of a local public emergency, has sought to further that interest in a manner now threatened by this litigation. As the State's chief law enforcement officer, the Attorney General has a duty to see that the laws of the State are uniformly and adequately enforced. Cal. Const., article V, § 13. The City of Oakland and the County of Alameda have similar responsibilities and, because the Cannabis Buyers' Cooperative is located within their respective jurisdictions, and because the City of Oakland has designated the Oakland Cannabis Buyers' Cooperative as its agent for the distribution of medical cannabis under its Medical Cannabis Distribution program, both are vitally interested in this action. In November 1996, the voters of California adopted Proposition 215, the *Compassionate Use Act of 1996,* which makes the use of cannabis lawful for specified, limited purposes. Perhaps no state law represents more compellingly the sovereign will of its citizens than that passed by direct ballot initiative. This proceeding calls into question the legitimacy of Proposition 215, and, thereby, the ability of this or any other State to address creatively the unique health needs of its citizens. This Court should respect the courage and determination of the people of California as these qualities find expression in the exercise of a sovereign State's fundamental right guaranteed by the Ninth and the Tenth Amendments of the United States Constitution and, by denying the injunction sought by the federal government, should confine the *Controlled Substances Act* to the established channels of federal authority.

ARGUMENT

A. INTRODUCTION

In 1970, Congress passed the *Controlled Substances Act* (CSA), classifying marijuana as a "Schedule I" drug, which means: "The drug or other substance has a high potential for abuse; the drug or other substance has no currently accepted medical use in

treatment in the United States; there is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812.

For more than a quarter century after the advent of the CSA, Californians and the rest of the nation watched as the war on drugs raged. The same period saw the ravages of AIDS rise from vague, disturbing rumors to horrifying reality. By 1996, the AIDS epidemic had killed millions of people throughout the world and had become the 8th leading cause of death in the United States. *CDC Media Relations: HHS News,* Oct 7, 1998.

Whether fortuitous or not, the period also saw the accumulation of first anecdotal and later solid scientific evidence that marijuana can relieve the suffering of those afflicted by certain types of illness, including glaucoma, multiple sclerosis, spasticity, severe pain, and nausea induced by the drugs used in chemotherapy and in the treatment of AIDS. *See,* generally, *Marijuana and Medicine: Assessing the Science Base*, National Academy Press 1999. More to the point, evidence indicates that for some, marijuana is the only drug capable of reducing their anguish. Against this backdrop, the citizens of California considered and overwhelmingly adopted the *Compassionate Use Act* intending to relieve the suffering of those beyond the reach of other medications.

Since 1996, eight states and the District of Columbia have joined California in authorizing the use of cannabis for seriously ill people. California's *Compassionate Use Act* provides in relevant part as follows:

> The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:
>
> > (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.
> >
> > (B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction. Cal. Health & Safety Code § 11362.5(b)(1)).

The Act does not legalize the general use of marijuana. It prohibits the use of marijuana for non-medicinal purposes, prescribing that "[n]othing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." Cal. Health & Safety Code § 11362.5(b)(2). In fact, California's determination to eradicate the unauthorized use of marijuana continues unabated. The California Department of Justice, Bureau of Narcotics Enforcement (BNE) operates The Campaign Against Marijuana Planting (CAMP), an aggressive marijuana interdiction and eradication effort. CAMP was established in 1983 under the direction of the Attorney General and BNE. This multi-agency law enforcement task force, managed by BNE, provides personnel to remove marijuana growing operations and promote public information and education on marijuana. Member agencies, comprised of local, state and federal law enforcement representatives, carry out the enforcement operations of this program. (*See* generally, California Department of Justice website at http://caag.state.ca.us.)

California has a sovereign right to decide, among other things, matters of public safety, medicine, and health necessity so long as in doing so it does not traverse a recognized power expressly granted to Congress. The *Controlled Substances Act* unduly interferes with the right afforded the States and their political subdivisions by the Ninth Amendment to enact and implement voter approved initiatives protecting the health, safety and welfare of their citizens. And by prohibiting the use of cannabis by seriously ill persons in States that have voter approved ballot initiatives, the CSA also violates traditional notions of State sovereignty protected by the Tenth Amendment. "[I]n our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice. . . ." *Twining v. State of New Jersey*, 211 U.S. 78, 106 (1908), citing *Hurtado v. California,* 110 U.S. 516, 527 (1884), overruled on other grounds in *Malloy v. Hogan*, 378 U.S. 1 (1964).

Amici Curiae have no desire to legalize interstate commerce in controlled

substances. However, they have a very strong desire to preserve its determination that under the limited circumstances authorized by California voters, the prescription, distribution and use of cannabis are not criminal acts.

B. THE CONTROLLED SUBSTANCES ACT IMPROPERLY INTERFERES WITH STATES' SOVEREIGN RIGHTS TO CARE FOR THE HEALTH, SAFETY, AND WELFARE OF THEIR CITIZENS

In our federal system States often serve as democracy's laboratories. *Washington v. Glucksberg* 521 U.S. 702 (1997); *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 292 (1990); *New State Ice Co. v. Liebmann* 285 U.S. 262, 311 (1932), Brandeis, J., dissenting. "The essence of federalism is that the state must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979). Taking care of the health, safety, and welfare of its citizens is the responsibility of the States. Although a relationship inevitably–and unavoidably–in tension, the States and the federal government are in partnership to protect the people from harm. In this as in any alliance differences of opinion arise concerning the best methods for achieving that objective.

The Framers recognized at the very inception of the Republic that a federal government might find it hard to resist the temptation to use its power to overbear the interests of the States. They provided the means for diminishing that risk by imposing limitations on the role of the federal government. As the U.S. Supreme Court noted recently:

> [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Alden v. Maine, 527 U.S. 706, 754 (1999), *quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, (1938).

Fulfilling their time-honored role as laboratories of democracy, the States are in by far the best position to determine whether the use of cannabis by seriously ill patients should

be permitted. As Justice Brandeis, observed,"[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." He cautioned, however:

> This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Boy Scouts of America v. Dale, 530 U.S. 640, 664 (2000) STEVENS, J., dissenting, quoting dissenting opinion in *New State Ice Co., supra* at 311.

Permitting the *Controlled Substances Act* to prohibit seriously ill citizens of California from using cannabis pursuant to the *Compassionate Use Act* violates the spirit of this tradition and unduly interferes with California's sovereign right to address matters of health, safety and welfare. This Court should not enjoin what California's democratic process has

i. Lawfully Enacted Innovative State Social Policies Should Not be Enjoined Based on Obsolete Legislative Findings

Advancements in science and technology often give lie to the verities of the moment. The CSA was enacted the year before the first commercial microprocessor was introduced. By 1996, the year California adopted the *Compassionate Use Act*, the Internet and the World Wide Web were skyrocketing. Millions of Americans owned and operated microprocessors in their cars, toys, ovens, as well as in their home and office computers. If the "findings" section of a 1970 law had stated, "microprocessor chips have no use in the home," certainly this Court would not refuse to admit evidence that now clearly contradicts that finding. Congress may be wise, but it cannot know the future. When Congress asserts "factual" findings that are plainly contradicted by objective evidence, a court must follow the evidence. At the time of its introduction, the CSA classified marijuana as a drug having no accepted medical use. Times change. The CSA classification is no longer a statement of science, but a hollow phrase

bereft of factual support. It should have collapsed upon itself long before the citizens of California adopted Proposition 215.

The development and use of Marinol, the trade name for a product containing synthetic THC, a psychoactive ingredient in marijuana, belies any credible contention that cannabis has no accepted medical use. "Dronabinol, the active ingredient in Marinol, is synthetic delta-9-tetrahydrocannabinol (delta-9-THC). Delta-9-tetrahydrocannabinol is also a naturally occurring component of *Cannabis sativa L.* (Marijuana)." *Physicians Desk Reference* 55th ed. 2001, page 2828. The outer parameters of that use may need further clarification, but they include ". . . treatment of: 1. anorexia associated with weight loss in patients with AIDS; and 2. nausea and vomiting associated with cancer chemotherapy in patients who have failed to respond adequately to conventional antiemetic treatments." *PDR* 55th ed. 2001, page 2829.

Much needs to be learned about the therapeutic uses of cannabis as a drug. The final protocols for its use, and the ultimate pharmacological mastery of the drug may await another day. However, the principal differences between synthetic dronabinol and the cannabinoids found in cannabis lie not in their medicinal properties, but in the manner of administration. There is no longer any validity to the characterization of marijuana as a drug with no currently accepted medical use.

Although the atmosphere surrounding the battle against drug abuse glows with the incandescent exhortations of its champions and detractors, the controversy surrounding Proposition 215 has nothing to do with the war on drugs. This case concerns no more than a State's right to enact regulations for the health and welfare of its citizens. The regulation California has chosen on this occasion is certainly controversial, perhaps even outrageous in some eyes. California's acknowledgment that cannabis can relieve suffering recognizes that a drug—even one roiled in controversy—having limited medical applications, or having a limited range of effectiveness still may have a legitimate use. State-authorized, medically indicated use should not be proscribed on any but the firmest scientific basis—particularly where, as here, the federal government's action unnecessarily and unreasonably brings the sovereignty of the State of California into conflict with the Congress of the United States.

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ii. *Controlled Substances Act*, as applied, violates the Ninth and Tenth Amendment Limits on the Power of Congress and the Federal Government

The Congress and the federal government have limited authority to interfere with Amici's interest in regulating the health, safety and welfare of their citizens. The Ninth Amendment to the Constitution of the United States recites that "[t]he enumeration in the Constitution, of certain rights, *shall not be construed to deny or disparage others retained by the people.*" (Emphasis added). It "preserves against encroachment by the federal government individual rights well embedded in state law until such rights are modified or abolished by state authorities or a judicial determination of unconstitutionality or in some way interfere with the proper scope of federal authority." *U.S. v. Stowe*, 100 F.3d 494, 500 (7th Cir. 1996), cert. denied, 117 S. Ct. 1438.

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from government infringement, which exist alongside those fundamental rights specifically mentioned in the first eight amendments." *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965), Goldberg J., concurring, Black J., dissenting). This case requires deference to that history. Proposition 215 authorizes the administration, wholly within California's borders, of an admittedly unconventional, but—in the professional judgment of their physicians— effective medication to a very limited class of persons.

The Supreme Court has recognized that controversial areas of social policy are best resolved through the democratic process. *(See Garcia, infra)* Whether to allow seriously ill patients the right to use cannabis upon the advice of a physician is one such controversy. The wisdom of deferring to the States' inventive genius for solving pressing issues of public health and welfare has no less force because the chosen solution challenges conventional norms.

The States reserved to themselves alone a police power to address the health and welfare of their citizens. "The [Tenth] Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity, or their

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abiity to function effectively in a federal system. . . ." *Fry v. United States*, 421 U.S. 542, 547, FN7 (1975).

> In the American constitutional system . . . the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government . . . . It is embraced . . . in that immense mass of legislation which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control." *Patterson v. Kentucky*, 97 U. S. 501, 503, 504 (1878) (internal citations and quotation marks omitted).

Although the federal government may spread its regulatory mantle quite far, there are no federal police powers by which it can cajole reluctant States into accepting its conception of proper *local* order. Congress has no general power to enact police regulations operative within a State's territorial limits (*Slaughter-House Cases*, 83 U.S. 36 (1872)), and it cannot take this power from the States or attempt any supervision over the regulations of the States established under this power. *Keller v. U.S.* 213 U.S. 138 (1909).

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, . . . matter[s] of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citations and internal quotation marks omitted).

The determination whether to enact a particular law or statutory scheme for the health and welfare of their citizens falls entirely within the powers retained by the States. "[W]hen a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end *as it may deem necessary* in order to make its action effective." *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 201 (1912) (emphasis added). This includes the power to define a public evil as the denial of medication necessary to relieve suffering.

In *National League of Cities v. Usery,* 426 U.S. 833 (1976), the Court attempted to lay down fixed markers by which to navigate the channels of federal authority. It held that in

order to succeed, a claim against the validity of a federal commerce clause enactment had to "establish that the challenged law regulated the States as States, addressed matters that are indisputably attribute[s] of state sovereignty, and directly impaired the ability of states to structure integral operations in areas of traditional governmental functions." Tribe, *American Constitutional Law,* 2d Ed., at 389 (1988) (internal quotation marks omitted). However, these markers proved inadequate to the task. Ultimately, in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), the Court removed them entirely. Writing for the majority, Justice Blackmun noted among other things, the "essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, *no matter how unorthodox or unnecessary anyone else–including the judiciary–deems state involvement to be."* *Id.* at 545–46 (emphasis added). While, perhaps ironically, *Garcia* represented the Court's brief movement away from the more systemic view of federalism embodied in *National League of Cities,* to which it later returned in *U.S. v. Lopez*, 514 U.S. 549 (1995) among others, it nevertheless recognized the importance of maintaining the State's preeminent role as caretakers of their citizens–a role at the heart of this controversy. It is one thing for the federal government to dictate what items may be transacted in interstate commerce, for example. It is quite another for it to impose its particular notions of medical propriety upon a State whose people have clearly and unequivocally exercised their discretion in a different direction. For then, the federal government arrogates to itself an unsustainable power.

C. The Controlled Substances Act Exceeds Congress' Commerce Clause Authority

The question presented here concerns not whether Congress may enact laws to control the interstate manufacture, transportation and sale of drugs, but rather the degree to which it may regulate purely local activity wholly confined *within* a State. It may not, for example, ban the possession of a weapon within a prescribed distance of a school *(Lopez,* 514 U.S. at 549), or impose civil remedies for gender-based violence *(U.S. v. Morrison,* 529 U.S. 598 (2000)), nor

may it make mere possession of a firearm by an ex-felon a federal crime absent a nexus to interstate commerce (*U.S. v. Bass,* 404 U.S. 336 (1971)). These acts exceed Congress' delegated powers.

Congress derives its authority to regulate interstate commerce from the Constitution, but though proceeding from that inspired instrument, these powers are not unlimited. Having so recently prevailed against the tyrannical forces of the Crown, the newly independent States were loath to submit once again to an imperious central authority. Indeed, the power granted to the federal government under the Constitution was deliberately restricted because of the jealous reluctance of the sovereign States to part with very much of it. As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The Federalist No. 45, *The Federalist: A Commentary on the Constitution of the United States,* p. 298 (Modern Library Edition, Random House Inc. 2000).

The Framers did not merely *consider* the notion of limiting the power of the federal government, they believed it imperative to do so. The purpose of the division of powers between the federal and State governments under the Tenth Amendment "is to protect the liberty of individual citizens from excessive concentration of power in a central government" (*Frank v. U.S.*, 78 F.3d 815, 825 (2d Cir. 1996), *cert. granted, judgment vacated on other grounds* in *Frank v. U.S.*, 521 U.S. 1114 (1997)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the State and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

Because the federal government is one of limited powers, "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. 'The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.'" *Morrision, supra,* at 607, citing *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 69 (1803) (Marshall, C.J.). Congress may not impose its will upon

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States except as its ability to do so finds specific support in the Constitution. A connection must exist between those powers and the prohibited act or conduct.

The federal government may legitimately exercise its powers, even to the extent of imposing its rules upon the States, when employing a power expressly granted by the Constitution such as that granted under the Commerce Clause "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *U.S. Const.*, art. I, § 8. This "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Lopez, supra*, at 552, citing *Gibbons v. Ogden,* 9 Wheat. 1, 189, 196, 6 L.Ed. 23 (1824). But the Constitution prescribes limits.

Generally, Congress may regulate three categories of activity under its commerce power: (1) It may regulate the use of the *channels* of interstate commerce, (2) It may regulate and protect the *instrumentalities* of interstate commerce and finally, (3) It may regulate those activities having a *substantial relation* to interstate commerce. *See, Lopez, supra.*

While conceding that guns are routinely bought and sold in interstate commerce, the Supreme Court found that the Gun-Free School Zones Act "has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Lopez, supra* at 561. The Court held: "The [Gun-Free School Zones] Act . . . neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." Id. at 551. Applying the same analysis to Proposition 215 requires the same result.

To be validly applied to this case, the *Controlled Substances Act* must necessarily contemplate and be restricted to the regulation of activities employing the channels and instrumentalities of–and having a substantial relationship to–interstate commerce. The activity permitted by California does none of these things. Although the cannabis prescribed and distributed under Proposition 215 *may* have hypothetical sources outside of this State, there is no

lawful intrastate or interstate trade in the drug, and California's statute does not assume reliance on illicit sources. More to the point, were the efforts of the federal, State, and local governments successful in their attempts to stop completely the illegal traffic in marijuana, the conduct authorized by Proposition 215 would be unaffected.

California's law has no ambitions beyond its own borders. To implicate federal authority, a *substantial connection* between what is authorized by the Proposition and interstate commerce must be demonstrated. Read in its proper context, Proposition 215 does not conflict with or otherwise implicate federal law. This State cannot—nor may it authorize others to—place in interstate commerce products prohibited by the federal government, and it does not presume to do so. To be lawful in California, the conduct must be confined within the narrow class of intrastate activities specifically authorized by Proposition 215. Judged in that light and interpreted to give effect to its provisions, the *Compassionate Use Act* only authorizes what is beyond the reach of federal law—the limited use of cannabis by its citizens for specified medicinal purposes.

In *Lopez* and again in *Morrison,* the Court firmly delineated the intersection of State sovereignty and federal authority under the Commerce Clause. The Court stated that because the Gun-Free School Zones Act "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce . . ." the Act exceeded Congress' authority to regulate "[c]ommerce among the several states . . ." *Lopez, supra,* at 551 (citations omitted). The CSA does purport to regulate commercial activity, which distinguishes it from the Gun-Free School Zone Act, but for the CSA to be correctly applied under these circumstances, the Constitution requires the regulated conduct be connected to commerce *among* the states— which it is not. "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons v. Ogden,* 9 Wheat. 1, 189, 194-196; *U.S. v. Morrison,* supra; *U.S. v. Lopez,* supra.

The commerce power "does not comprehend the purely internal domestic

commerce of a State which is carried on between man and man within a State or between different parts of the same State." *Kidd v. Pearson* 128 U.S. 1, 17, 20-22 (1888). Nor does it comprehend the purely internal exercise of California's police powers to ease the suffering of those identified by Proposition 215.

Although the CSA recites that "[i]ncidents of the traffic [in controlled substances] which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce" (21 U.S.C. § 801(3)), that is not the case here. As has often been observed, simply calling a thing by a name does not make it so. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 174 (1976). More precisely, even though "Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez,* supra, at 557. The Court has never declared "that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 558. Otherwise, "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Id* at 577. In this case, as in *Lopez*, "neither the actors nor their conduct has a commercial character. . . ." *Id.* at 580. While the statute may have "an evident commercial nexus," *(Id.* at 580) its applicability to the conduct authorized under California law is theoretical to the point of invisibility and the Court has consistently required more than hypothetical connections to interstate commerce. "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Id.* at 580.

The language of Proposition 215 carefully distinguishes what it authorizes from what it prohibits. All traffic in marijuana not specifically authorized, which the CSA properly addresses, also violates California law. Unfortunately, the CSA, in failing to make the same distinction, exceeds the power of Congress.

The activity authorized by the California statute presumes nothing upon federal

law, nor supposes to make legal what the federal government has properly banished from interstate commerce. One searches in vane for a nexus between the conduct authorized by California and the conduct prohibited by Congress. Allowing application of the CSA to this situation would permit the federal government to "take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities." *Id.* at 611

In Proposition 215, California has simply determined, consistent with its sovereign police power, that for these purposes, cannabis lawfully may be prescribed and used. "[T]he interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel,* 301 U.S. 1, at 37 (1937).

CONCLUSION

California's unequivocal determination to authorize the medical use of cannabis deserves the respect due lawful acts of a sovereign State. Its decision to enact Proposition 215 "must be considered in light of our dual system of government." The Commerce Clause does not permit Congress to insert itself into activities having no more than "indirect and remote" effects on interstate commerce, nor does it authorize intrusions upon State acts having no effects whatsoever on interstate commerce. The federal government's attempts to impose its will on California in defiance of the expressed desires of its citizens usurps the sovereign rights of the States under the Ninth Amendment, it intrudes upon the powers reserved to the States under the Tenth Amendment, and exceeds the power delegated to Congress by the Commerce Clause of the United States Constitution.

"All great truths begin as blasphemies." *Hoffman v. Cargill*, 142 F.Supp.2d 1117, 1118 (2001), *quoting* George Bernard Shaw. The question here is what deference shall be paid to California's heretical decision to test the medical efficacy of marijuana for the purpose of

relieving suffering caused by illness or disease. Amici curiae State of California, City of Oakland, and County of Alameda respectfully submit that Californians have a constitutionally protected right to indulge this blasphemy — so long as its utterance is wholly contained within State boundaries. Although none can say what great medical truths, if any, California's intrepid initiative may ultimately liberate, this experiment by one of the nation's great laboratories of democracy should not be enjoined.

February 8, 2002

Respectfully Submitted,

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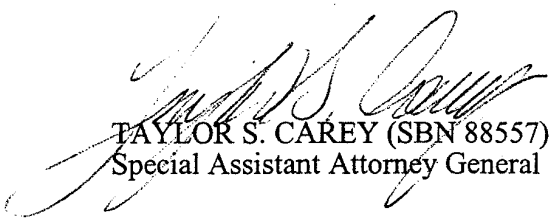

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DECLARATION OF SERVICE

Case Name: ***UNITED STATES OF AMERICA, Plaintiffs, v. OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES.***

No.: 98-0088 CRB

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I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550.

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BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF DEFENDANTS MOTION AFTER REMAND TO DISSOLVE OR MODIFY PRELIMINARY INJUNCTION.

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on February 13, 2002, at Sacramento, California.

Tina M. Blaskett
DECLARANT